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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-667

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Respondents

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THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a judicial determination by entry of summary judgments in two prior cases, that the facts brought forth by depositions, pre-trial conferences, and other discovery devices did not show either monopolization, attempted monopolization, or conspiracy under Sections 1, 2 or both of the Sherman Act, operate to bar two subsequent actions based solely upon a continuation of the same facts.

STATEMENT OF THE CASE

Respondents accept the judicial history of the New Orleans phase of this litigation as set forth at pages 111 through 114 of the Fifth Circuit's opinion.[1]

A review of that history reveals that the operative facts in this litigation are, contrary to Petitioners' representations, substantially different from those in *Lawlor v. National Screen Service Corp.*,[2] upon which Petitioner relies so heavily. In *Lawlor*, the first suit between the parties was settled and no judicial determination whatsoever was made by the Court. In the instant case, the first two suits between the parties resulted in summary judgments in favor of the respondents with the express finding that there was no genuine issue of material fact to be tried as to the Petitioner's claim of monopolization, attempted monopolization, or conspiracy. Those judgments were not appealed and became final. A brief review of the two prior cases will put the instant consolidated actions in perspective and demonstrate the complete dissimilarity of these cases and the *Lawlor* case.

On May 17, 1961 Petitioner filed its first action against Respondent National Screen and six of the seven Producer-Respondents.[3] Petitioner filed its second action on November 30, 1964 against National Screen and all seven Producer-Respondents, charging the same alleged antitrust violations that were asserted in the instant consolidated third and fourth actions.

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1. 517 F.2d 110 (5th Cir. 1975).

2. 349 U.S. 322 (1955).

3. In the New Orleans phase of this litigation Columbia was not named as a defendant in the first suit, but was made a defendant in the three subsequent suits.

Petitioner's first two actions were dismissed by judgment of the District Court granting Respondents' motions for summary judgment on the ground that the facts brought forth by depositions, pre-trial conferences and other discovery devices did not show either monopolization, attempted monopolization or conspiracy under either Section 1 or 2 of the Sherman Act.

The complete identity as to parties and claims of both prior actions and the instant third and fourth consolidated actions was expressly conceded by Petitioner at page 11 of its brief in the Court of Appeals on its prior appeal with the following statement:

> "The instant case was filed August 11, 1967. As aforesaid the parties named therein are the same or substantially the same as the parties named in the two prior cases and the Complaint filed is substantially the same as the Complaints filed in the two prior cases except that in the instant case plaintiff claims to recover damage only for injuries suffered and losses sustained after the period covered by the prior cases."[4]

Based upon the summary judgments granted in Suits 1 and 2 the District Court on July 8, 1968 granted summary judgment in suit No. 3 on the ground of *res judicata*. The Court of Appeals, however, remanded the case to the District Court to afford Petitioner the opportunity to establish the existence of any new violations occurring after May 16, 1961.

After hearings had in the District Court, held pursuant to the Court of Appeals direction, the District Court made the following findings:[5]

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4. Docket No. 26,643 of the Fifth Circuit Court of Appeals.

5. Reproduced at pages 56-59 of Appendix "C" annexed to the Petition.

"Thus, one of the issues before this Court at this time is whether under this mandate, Plaintiff has demonstrated that it might be able to prove any post-1961 action or non-action by defendants.

"After a careful review of the record, the admissions, briefs and other pleadings on file and admissions by counsel for plaintiff in pre-trial conferences and in open court, we conclude that the answer to that question is No.

"Plaintiff has admitted in its answers to Request for Admissions that the facts constituting its case, insofar as proof of acts constituting anti-trust violations, all occrued before May 16, 1961.

"Counsel for plaintiff has repeatedly stated that the conspiracy and monopoly upon which it relies became complete on May 16, 1961, and that after that date defendants did not do or say anything different from what was said or done by them before that date.

"At the hearing on this motion, counsel for plaintiff stated in open court that if it is assumed that all acts committed by defendants prior to 1961 are legal and lawful, *plaintiff has no case and should be out of court.*

"The only overt acts attributable to defendants were those committed prior to, and which culminated with the May 16, 1961, termination of plaintiff's supply of advertising accessories by National Screen.

* * *

"In effect, what plaintiff contends is that all of the overt acts which violated the anti-trust laws were committed prior to May 16, 1961, but by continuing to do after that date what it did before that date, defendants have continuously violated the Sherman Antitrust Act and thus a new cause of action has accrued to plaintiff each and every day since May 16, 1961.

"We disagree. *What plaintiff has continued to overlook is the prior adjudication of Suits 1 and 2 holding that defendants were not engaged in an unlawful conspiracy, continuing or otherwise.*

"The issue presented in Suits 1 and 2 was whether defendants' pre-May 16, 1961 conduct violated the antilaws. That same issue is presented in Suits 3 and 4. Basically plaintiff claims the same rights, and charges the same wrongs, against defendants in Suits 1 and 2 that are charged in Suits 3 and 4. New claims are not being asserted against these defendants merely the same old claims. (Refers to Chief Judge Brown's discussion in Exhibitors Poster Exchange v. National Screen, 421 F.2d 1313 at pp. 1316 et seq.) (Emphasis supplied)

THE DISTRICT COURT'S CONCLUSIONS OF LAW

Having made the foregoing findings, the District Court reached the following legal conclusions:

"Thus we conclude that Exhibitors' claims in Suits 3 and 4 are precisely the same as they were in Suits 1 and 2, except for the period of time for which it seeks damages. Since plaintiff looks to pre-1961 conduct to prove its damages, *and since that conduct has been judicially determined by Suits 1 and 2 to be neither monopolization, attempted monopolization or conspiracy, we conclude that the pending actions are barred by the principle of res judicata.* (Citing U.S. v. Moser, 266 U.S. 236)

"We further conclude that plaintiff is collaterally estopped from now litigating the question of whether defendants relationships and conduct pre-May 16, 1961 violated the antitrust laws.

"Under the doctrine of collateral estoppel, facts found through litigation in any form are conclusive upon the parties in any subsequent litigation. Determination by a prior court that acts of defendants were not violative of the antitrust laws is binding upon the parties in a subsequent action to have the same acts declared violative of these same laws. (Citing Blonder-Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313)

"In addition, we conclude that plaintiff's claim is barred by the 4 year statue of limitations, 15 U.S.C. 15b. (Emphasis supplied)

Despite the overwhelming proof established by Petitioner's "admissions, briefs, and other pleadings on file, and admissions by counsel for plaintiff in pre-trial conferences, and in open Court," referred to by the District Court in its Findings, the Fifth Circuit, in order to be sure that those Findings were correct, assumed the burden of:

". . . . a close examination of the records in Suits 1 and 3 to determine the precise questions there resolved . . . ."

and the Fifth Circuit concluded that:

"these judgments as we have already noted, were found clearly to hold in favor of the lawfulness of the defendants' pre-1961 actions. So much established, plaintiff Exhibitors is estopped from attempting to prove the alleged wrongfulness of the defendants' continuation of identical conduct during the period sued upon here; and the district court was correct in entering summary judgment for the defendants in this case."[6]

The Court of Appeals further concluded that since it affirmed the summary judgments on the basis of collateral estoppel, it did "not reach the alternative grounds." The alternative grounds" to which the Court of Appeals referred were *res judicata* and the statute of limitations, which the District Court had found to be applicable.

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6. p. 46 of Appendix "A" annexed to the Petition.

ARGUMENT

1. THE FIFTH CIRCUIT DECISION IS CONSISTENT WITH LAWLOR V. NATIONAL SCREEN SERVICE CORP.

As previously noted,[7] the facts in the instant case differ substantially from the facts of the *Lawlor* case. The prior judgment in *Lawlor* was a consent judgment based upon a settlement; in the instant cases, the prior judgments were the product of a adversary hearing at which Petitioner was given every opportunity to produce evidence of its claims, but was unable to do so. Moreover, *Lawlor* did not deal with the doctrine of collateral estoppel at all, but rather with res judicata, as this court noted at page 326 of its opinion:

> "Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved *because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.*' " *(Emphasis supplied)*

Far from supporting Petitioner's application, the quoted language confirms that a case which has been decided upon an express finding that there is no genuine issue of material fact precludes subsequent judicial inquiry into that finding. Further in the *Lawlor* opinion, this Court recognized that the judgment in the prior case did not bind the parties on any issue ". . . .such as the legality of the exclusive license agreements or their effect on Petitioner's business." However, in the instance case the legality of the agreements between the producers and National Screen was expressly put at issue in the prior litigation and their legality was sustained by entry of summary judgments, not by consent. Indeed, Petitioner strenuously urged that these agreements were illegal, but that contention was rejected.

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7. Supra at p. 2.

Petitioner simply ignores the crucial distinction between *Lawlor* and the instant cases, to which this Honorable Court so clearly points, *i.e.* that in the *Lawlor* case, the judgment entered dismissing the complaint rested upon a stipulation of settlement of the dispute —— without any judicial participation or determination and therefore could not possibly form the basis of a judicial estoppel. This basic determinative factor was high-lighted by this Honorable Court in its footnote No. 12 in which this Court quoted at length from its prior decision in *United States v. International Building Co.*,[8] —— a case in which this Court similarly refused to apply *res judicata* to a Tax Court determination made on the basis of a stipulation settling a dispute. In this connection, this Court quoted the following from the opinion in the *International Building* case:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a pro forma acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see Russell v. Place, 94 US 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that Court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration."[9]

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8. 345 U.S. 502 (1953).

9. *Id.* at p. 506.

In this Court's opinion in the *International Building* case, immediately following the foregoing quotations, this Court added the determinative conclusion which establishes the total irrelevance of the *Lawlor* case upon which Petitioner relies:

> "But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause." [10]

In the *Lawlor* case, there was no judicial determination, merely a stipulation between the parties authorizing the entry of a judgment dismissing the case.

However, in the instant consolidated cases, Suits 1 and 2 were terminated by summary judgments entered by the Court after judicial consideration of the evidence presented by depositions, pre-trial conferences, and other discovery devices, which judgments concluded that Petitioner had failed to raise a genuine issue with respect either to monopolization, attempted monopolization or conspiracy.

The aforementioned basic distinction was fully recognized by the court in *Vogelstein v. National Screen*, 11 which the Court of Appeals unanimously affirmed, [12] and plaintiff's petition for certiorari in that case was denied by this Court. [13]

2. PETITIONER'S CONTENTION THAT A SUMMARY JUDGMENT CANNOT FORM THE BASIS FOR COLLATERAL ESTOPPEL IS CONTRARY TO SETTLED LAW

The response by the Court of Appeal crisply rejecting Petitioner's contention would suffer dilution and loss of clarity,

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10. Ibid.

11. 204 F.Supp. 591 at p. 596 (E.D.Pa. 1962).

12. 310 F.2d 738 (3d Cir. 1962).

13. 374 U.S. 840 (1963).

were one to attempt to summarize. Accordingly, we take the liberty to quote the following from the Court of Appeals earlier opinion remanding this case for possible establishment of post-1961 violations:

> "We reject out of hand the beguiling but superficial contention of Exhibitors [Petitioner] that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.
>
> "It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence plaintiffs defendants, or all – of a directed verdict. Indeed, a more positive adjudication is hard to imagine. (Citing Hyman v. Regenstein, 5 Cir, 258 F.2d 502, 510, cert den. 359 U.S. 913; Wolcott v. Hutchins, 280 F.Supp. 559, 563 (S.S.N.Y.)).
>
> * * *
>
> "It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen in 1961 constituted an illegal conspiracy.
>
> * * *
>
> "Thus the Court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by deposition, pre-trial conferences, and other discovery devices did not show either monopolization, attempted monopolization or conspiracy on the part of National Screen under Sections 1, 2 or both." [14]

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14. Exhibitors Poster v. National Screen, 421 F.2d 1313 at p. 1320 (5th Cir. 1970).

Since Petitioner's claim in all four actions is that all Respondents had jointly conspired from 1940 to 1961 to effect through National Screen a monopoly in the manufacture and distribution of motion picture advertising accessories, the Court of Appeals' determination as to the legal effect of the prior summary judgments was correctly applied to all Respondents.

Moreover, it is settled law that the formalities of a trial, attended with formal findings of fact or an opinion by the Court, are not prerequisites to the application of the doctrine of collateral estoppel. [15] The *Napa Valley* case provides a good example of how far this Honorable Court has gone to prevent repetitive litigation. There the plaintiff utility had its contract rates reduced by the Railroad Commission, in spite of subsisting contracts at higher rates. Plaintiff petitioned the California Supreme Court to issue a Writ of Review of the Railroad Commission's decision – but the California Supreme Court refused to issue such a writ.

Plaintiff then sued in the United States District Court to enjoin the Commission from enforcing its orders.

The Commission moved to dismiss on the ground that the subject matter had been judicially passed upon by the Supreme Court of California when it refused to issue the writ, which refusal was pleaded in bar to the motion in the United States District Court. In affirming the District Court's dismissal, this Honorable Court said:

> "And so with the denial of the petition of the Electric Company, it had like effect and was the exercise of the judicial powers of the court. And we agree with the district court that 'the denial of the petition was necessarily a final judicial determination, based on the identical rights', asserted in that court and repeated here. Williams v. Bruffy, 102 U.S. 248, 255. *And further, to quote the district court 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'. . . Calaf*

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15. *Napa Valley Electric Co. v. R.R. Commission of California*, 251 U.S. 366 (1920).

v. Fugural v. Calaf v. Rivera, 232 U.S. 371; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299;

> "The Court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore, the decree of the District Court is affirmed."[16]

To the same effect, see *Thomas v. Consolidation Coal Co.*[17]

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16. *Id.* at pp. 372-373 (Emphasis supplied).

17. 380 F.2d 69, at p. 80 (4th Cir. 1967).

CONCLUSION

Respondents respectfully submit that the Petition fails to present any question of law or issue affecting public policy requiring review by this Honorable Court.

Petitioner's application for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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QUESTION PRESENTED

The question involved in this case is identical to that presented in *Exhibitors Poster.* See P. 1, *supra.*

STATEMENT OF THE CASE

This case relates to the Atlanta phase of this litigation.

Respondents [18] accept the judicial history as set forth at pages 118 through 121 of the Fifth Circuit's opinion.[19] While the history differs slightly from the New Orleans phase of this litigation, the operative facts are substantially identical to the New Orleans phase.

ARGUMENT

The arguments advanced by th Respondents in *Exhibitors Poster, supra,* are equally applicable to the instant case and are adopted herein by reference.

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18. While Columbia was a party to this phase of the litigation in the Fifth Circuit, it is not a party here since the Fifth Circuit remanded as to Columbia in Atlanta and the instant petition for certiorari seeks no relief against Columbia. Universal Film Exchanges, Inc., a party in the New Orleans phase of this litigation, has never been a party in the Atlanta phase. Thus, the respondents in the Atlanta phase consist of MGM, Paramount, Fox, United Artists, and Warner.

19. The Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (1973).

CONCLUSION

No basis for granting a writ of certiorari has been advanced by Petitioner. There is no conflict between the Fifth Circuit's decisions in these companion cases and any case decided by this Court. To the contrary, the decisions are consistent with the principles enunciated this Court in its *Blonder-Tongue*[20] decision.

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20. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Opposition have been served on the following counsel for Petitioners, at the addresses following their names, by United States mail, postage prepaid, on this _____ day of December, 1975:

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